

# On Torture, or Cruel, Inhuman, and Degrading Treatment\*

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IN this paper I discuss the modern conception of "cruelty," in particular as represented in Article 5 of the *Universal Declaration of Human Rights*: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In this statement the adjectives qualifying "treatment or punishment" seem to indicate forms of behavior that if not quite equivalent to "torture," at least have a close affinity with it.

Moral and legal judgments that derive from this rule have an interesting history in the West, to which I shall advert in what follows. I want to advance the thesis that the universal rules enshrined in the Declaration cover a wide range of qualitatively different kinds of behavior. More precisely, I shall try to make four points: first, that the modern history of

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"torture" is not only a record of the progressive prohibition of cruel, inhuman and degrading practices. It is also part of a more complex story of the modern secular concept of what it means to be truly human. The second point is this: the phrase "torture or cruel, inhuman or degrading treatment" serves today as a cross-cultural criterion for making moral and legal judgments about pain and suffering. Yet it is given much of its operative sense historically and culturally. My third point is linked to the first two. It is that the new ways of conceptualizing *suffering* (which include "mental torture" and "degrading treatment") and *sufferer* (a term that now refers also to non-humans and even to the natural environment) are increasingly universal in scope but particular in prescriptive content. The final point is that the modern dedication to eliminating pain and suffering often conflicts with other commitments and values: the right of individuals to choose and the duty of the state to maintain its interests.

Together, these four points aim at underscoring the unstable character of a central category deployed in modern, Western society. The instability relates, in brief, to the fact that the ideas of torture, cruelty, inhumanity, and degrading treatment are intended to measure what are often incommensurable standards of behavior. In addition, they are applied in particular cases in a contradictory fashion.

I do not argue that there can be no such thing as cruelty. I am merely skeptical about *the universalist discourses* that have been generated around it. But my skepticism is intellectual, not moral. This paper is not concerned with attacking the reforms that take their inspiration from the United Nations condemnation of "torture or cruel, inhuman and degrading treatment." I am interested primarily in the way Western discourses about cruelty hang together, and the ways that the idea of torture can overlap with and substitute for ideas of cruel, inhuman, and degrading treatment—as well as of the inflicting of pain and suffering on others. In my view, such inquiries are necessary if we seek to clarify our transcultural judgments.

*Two Histories of Torture*

I begin with a discussion of two books which together show very different ways of writing histories of cruelty. The first, by G.R. Scott, represents physical cruelty as a feature of barbaric societies—that is, societies that have not yet been humanized. The other book is by D. Rejali. It makes a distinction between two kinds of physical cruelty, one appropriate to pre-modern and the other to modern societies, and describes that difference in the context of contemporary Iran.

Scott was a Fellow of several British learned societies, including among them the Royal Anthropological Institute. His *History of Torture* (1940) is perhaps the first modern story of its kind. It deals at length with “Savage and Primitive Races,” ancient and early modern European peoples, and Asian “civilizations” (China, Japan, and India). On the one hand, it tells a story of punishments now largely discontinued or suppressed; on the other, it speaks of motives for inflicting suffering that are deep-rooted and pervasive. His indebtedness to Krafft-Ebing’s ideas is evident not only in explicit form in his chapters on “Sadism” and “Masochism,” but also in the general evolutionary scheme he employs according to which the primitive urge to inflict pain remains a latent possibility (sometimes realized) in civilized society.

Scott is somewhat unusual for his time in wanting to include the mistreatment of animals in his account of torture, and in describing their plight as a consequence of the non-recognition of rights, for like other moderns he sees the extension of rights to be crucial for the elimination of cruelty. But in the course of arguing this thesis he hits on a profound and disturbing ambiguity. It is not entirely clear whether he thinks that human cruelty is merely an instance of *bestial* cruelty—that is, a working out of the supposedly universal instinct of stronger animals to hunt or attack the weaker. Or whether human

cruelty is unique—not a characteristic of animal behavior at all—and that everyday human ruthlessness toward animals is essential for justifying the persecution of vulnerable people (defeated enemies, uninitiated children, and so on) on the ground that they are *not fully human*. In either case, Scott disturbs liberal ideas of what it is to be truly human: humans are essentially no different from other animals, or they are different by virtue of their unique capacity for cruelty.

It is worth noting that the instances of physical pain Scott describes as “torture” belong sometimes to the involuntary submission to punishment and sometimes to the practices of personal discipline (for example, rituals of endurance, asceticism). He makes no distinction between the two: pain is regarded as an isolable experience to be condemned for what it is.

In the encounter between “Savage Races” and modern Euro-Americans, Scott has no doubt that “torture” is something the former do to the latter—perhaps because it is synonymous with “barbarity.” At any rate, the sufferings inflicted on Native Americans by white settlers and the expanding United States have no place in his history of torture.

This is not to say that Scott asserts torture to be entirely absent in the modern state. On the contrary, he is quite explicit about its use by the police to secure confession (“the third degree”). His position is that the story of modernity is in part a story of the progressive elimination of all morally shocking social behavior—including what is now described in international law as “cruel, inhuman and degrading treatment or punishment.” Scott does not claim that that intention has been fully realized, only that progress has been made. In this story of progress, he tells us, the state’s definition and defense of rights is the most effective protection against cruelty.

In his important book, the Iranian political scientist Darius Rejali makes the interesting argument that far from being a barbaric survival in the modern state as Scott’s story suggests,

torture is in fact integral to it (Rejali, 1994). Although he classifies torture into two types, modern and pre-modern, he shares with Scott the view that the term "torture" has a fixed referent. More precisely, both of them assume that to speak of torture is to refer to a practice in which the agent *forcibly* inflicts pain on another regardless of the place that the practice occupies within a larger moral economy.

Rejali offers a sophisticated account of the role of political punishments in Iran both before and after the inception of modernization in that country. Modern torture, he tells us, is a form of physical suffering that is an inseparable part of a disciplinary society. In Iran, the practice of torture is as essential to the Islamic Republic today as it was to the Pahlevi regime it replaced. Both in their own way are modern disciplinary societies.

Rejali believes that his book refutes what Foucault had to say about torture in *Discipline and Punish* (1979).<sup>1</sup> He maintains that torture does not give place to discipline in modern society, as Foucault claimed, but persists in a major way. This belief, in my view, arises from a misreading of Foucault, whose central concern was not with "torture" but with "power": and consequently with a contrast between sovereign power (which needs to exhibit itself publicly) and disciplinary power (which works through the normalization of everyday behavior).

Public rituals of torture are no longer deemed to be necessary to the maintenance of sovereign power (whether they were in fact functionally necessary to the maintenance of "social order" is, of course, another question). But Foucault's thesis about disciplinary power is not subverted by evidence of *surreptitious* torture in the modern state. On the contrary, precisely because torture carried out in secret is said to be connected with the extraction of information, it is an aspect of policing. (The actual motives of torturers, whether in modern or in premodern states, are usually mixed and variable.) Policing as a governmental activity directed at defending a fundamental "interest of society" concerns the ordinary and

extraordinary security of the state and its citizens. It is an institution in which knowledge and power depend upon each other: much of it—and this point is curiously neglected by Rejali—circulating in secret.

Modern torture as part of policing is typically secret partly because inflicting physical pain on a prisoner to extract information, or for any purpose whatever, is “uncivilized” and therefore illegal. It is also secret because policing agents do not wish to advertise everything they learn from tortured prisoners. After all, the effectiveness of certain kinds of disciplinary knowledge depends upon its secrecy. The secret character of knowledge acquired in policing, therefore, relates at once to the uncertainty of outside critics as to whether, and if so how often, something illegal has been done by a bureaucratic power to obtain it (“torture is intolerable in a civilized society”), and also to how, when, and where law-enforcing power chooses to act once it possesses that secret information (“every society must protect itself against criminal conspiracies”).

Rejali’s definition of torture as “sanguinary violence condoned by public authorities” slips uneasily between the legitimate and public practice of classical torture on the one hand, and, on the other hand, the *secret* because “uncivilized” character of policing torture in modernizing states like Iran. His fuller argument does not address this difference. Modern torture, he insists at length, is integral to what Foucault called disciplinary society. It is, if not itself quite identical with discipline, then very close to it.

There are valuable insights in Rejali’s book relating to the brutalizing aspect of the process of modernization. Here I mention only two objections that might be made to his argument. The first is that his main example (twentieth-century Iran) relates to what many readers will identify as a “modernizing” rather than a “fully modern” society. Whether all the transformations in Iran in the period covered by Rejali’s book truly represent modernization in the sense of moral

improvement is—these readers will say—an open question, but shocking evidence of blatant torture in that country does not prove that torture is integral to modernity. I believe that Rejali is right, but his argument at this point would have been stronger if he had referred to a modern society, like Nazi Germany, rather than a society merely on the way to being modernized.<sup>2</sup> For although Nazi Germany was notoriously an *illiberal* state, it was certainly no less modern than any other.

The other objection is this: Rejali does not explain why, unlike discipline, *modern* state use of torture requires the rhetoric of denial. In pre-modern societies of the kind Foucault called Classical, torture was carried out unapologetically and in public. Why does “torture” now typically generate a discourse of secrecy-and-exposure? The brief answer to this question, surely, is that there is now a new sensibility regarding physical pain. Although it occurs frequently enough in our time, the modern conscience regards the inflicting of pain without “good reason” (to perform a medical operation, say) as reprehensible and, therefore, as an object of moral condemnation. It is this attitude to pain that helps define the modern notion of cruelty.

The modern conscience is also a secular conscience, a category that subsumes what we now know as modern religion. Christianity, which was traditionally rooted in the doctrine of Christ’s *passion*, consequently finds it difficult to make good sense of suffering today. Modern theologians have begun to concede that pain is essentially and entirely negative. “The secularist challenge,” writes a modern Catholic theologian,

even though separating many aspects of life from the religious field, brings with it a more sound, interpretive equilibrium; the natural phenomena, even though sometimes difficult to understand, have their cause and roots in processes that can and must be recognized. It is a man’s job, therefore, to enter into this cognitive analysis of the meaning of suffering, in order to be able to affront and conquer it. . . . Through his works, even before his words, Jesus of Nazareth proclaimed the goodness of life and of health, as the image of salvation. For Him pain is negativeness (Autiero, 1987, p. 124).<sup>3</sup>

The writer in this passage is clearly thinking of disease, but since pain can also be a consequence of human intention, it follows that such pain should be eliminated from the world of human interaction—even from religious disciplines and from the enactment of martyrdom, where it once had an effective and honored place. The secular Christian must now abjure passion and choose action. Pain is not merely negativeness. It is, literally, a scandal.

### *Abolishing Torture*

Why has the infliction of physical pain now become scandalous? A well-known part of the answer is this progressivist story: two centuries ago critics of torture like Beccaria and Voltaire recognized how inhuman it was and how unreliable as a way of ascertaining the truth in a trial. Thus, they saw and articulated what others before them had (unaccountably) failed to see. Their powerful case against judicial torture shocked Enlightenment rulers into abolishing it. The theme of its intolerable cruelty emerged more clearly because the pain inflicted in judicial torture was declared to be *gratuitous*. Pain inflicted on prisoners to make them confess was immoral, it was argued, particularly because it was grossly *inefficient* in identifying their guilt or innocence.<sup>4</sup> (The Enlightenment reformers did not necessarily condemn physical punishment as such, because it involved considerations other than simple instrumental ones, especially ideas of justice. Eventually, however, the evolution of modern ideas of justice were to contribute to growing hostility to painful punishment.) But why was this gratuitous pain not condemned by critics earlier? What had prevented people from seeing the truth until the Enlightenment?

In his brilliant study, *Torture and the Law of Proof*, John Langbein has provided a partial explanation. He demonstrates that torture was proscribed when the Roman canon law of



proof—which required either confession or the testimony of two eyewitnesses to convict—declined in force in the seventeenth century. Increasing resort to circumstantial evidence secured convictions more easily and speedily. The abolition of judicial torture was, thus, in effect the moral condemnation and legal proscription of an extremely cumbersome and lengthy procedure that was now coming to be regarded as more or less redundant. Langbein implies that the moral truth about judicial torture was linked to the prior construction of a new concept of legal truth (Langbein, 1977).

When *torture* was the object of vigorous polemic in the eighteenth century, Jeremy Bentham came to the conclusion that the pain of torture is sometimes easier to justify than the suffering inflicted in the name of punishment. In the course of this justification he maintained, for example, that Courts of Law resorting to imprisonment in cases of contempt might find the application of physical pain, or even the threat of applying it, would secure obedience in a way “less penal” than prison:

A man may have been lingering in prison for a month or two before he would make answer to a question which at the worst with one stroke of the rack, and therefore almost always with only knowing that he might be made to suffer the rack, he would have answered in a moment; just as a man will linger on a Month with the Toothach [sic] which he might have saved himself from at the expense of a momentary pang.<sup>5</sup>

It is not Bentham's apparent refusal to distinguish between voluntary and involuntary subjection to pain that should be noted here. It is the idea that subjective experiences of pain can be objectively compared. This idea is crucial for the modern understanding of “cruel, inhuman and degrading treatment” in a cross-cultural context, although liberals today would strongly reject Bentham's view regarding the occasional preferability of torture to imprisonment. For it is precisely some notion of comparability in suffering that makes of long

years in prison (including solitary confinement) a "humane" punishment and of flogging an "inhumane" one, even though *the experience* of imprisonment and of flogging are qualitatively quite different.

In an interesting passage in *Discipline and Punish* Foucault notes that in the nineteenth century imprisonment was compared favorably to other forms of legal punishment mainly because it was regarded as the most egalitarian (Foucault, 1979, p. 232). This was a consequence of the philosophical doctrine that *freedom was the natural human condition*. Penal reformers reasoned that since the desire for liberty was implanted equally in every individual, depriving individuals of their liberty must be a way of striking at them equally—that is, regardless of their social status or physical constitution. For just as fines were easier for the rich to pay, so physical pain could be borne better by the more sturdy. No form of punishment accorded so precisely with our *essential humanity*, therefore, as imprisonment did. That legal incarceration was considered to be equitable contributed to the sense that physical punishment was gratuitous. For this reason, although modern liberals must regard Bentham wrong in the conclusion he reached about torture, they must consider him right to have endorsed a quantitative comparison of very disparate kinds of suffering. It is not difficult to see how the utilitarian calculus of pleasure and pain has come to be central to cross-cultural judgment in modern thought and practice. For by a reductive operation, the idea of a calculus has facilitated the comparative judgment of what would otherwise remain incommensurable qualities.<sup>6</sup>

### *Humanizing the World*

The historical process of constructing a humane society, it is said, has aimed at eliminating cruelties. Thus, it has often been observed that European rule in colonial countries, although

not itself democratic, brought about moral improvements in behavior—that is, the abandonment of practices that offend against the human.

Major instruments in this transformation were modern legal, administrative, and educational practices. And a central category deployed in them was the modern category of customary law. James Read writes:

Of all the restrictions upon the application of customary laws during the colonial period, the test of repugnancy 'to justice or morality' was potentially the most sweeping: for customary laws could hardly be repugnant to the traditional sense of justice or morality of the community which still accepted them, and it is therefore clear that the justice or morality of the colonial power was to provide the standard to be applied.

Read points out that the phrase "repugnant to justice and morality" does not have a precise legal meaning, and that early legislation in the colonies sometimes employed other expressions, such as "not opposed to natural morality and humanity," to perform the same revolutionary work (Read, 1972, p. 175).

But moral and social progress in those countries has been uneven. Although Europeans tried to suppress cruel practices and forms of suffering that were previously taken for granted in the non-European world by making the practitioners legally culpable, the suppression was not always completely successful. Today the struggle to eliminate social suffering is taken up by the United Nations. Or so the story goes.

I want to propose, however, that in their attempt to outlaw customs the European rulers considered cruel it was not the concern with indigenous suffering that dominated their thinking, but the desire to impose what they considered civilized standards of justice and humanity on a subject population—that is, the desire to create new human subjects.<sup>7</sup> The anguish of subjects compelled under threat of punishment to abandon traditional practices—now legally branded as "repugnant to justice and morality," or as "opposed to natural

morality and humanity," or even sometimes as "backward and childish"—could not, therefore, play a decisive part in the discourse of colonial reformers. On the contrary, as Lord Cromer put it with reference to the misery created among the Egyptian peasantry by legal reforms under British rule: "Civilisation must, unfortunately, have its victims" (1913, p. 44). In the process of learning to be "fully human," only some kinds of suffering were seen as an affront to humanity, and their elimination sought. This was distinguished from suffering that was *necessary* to the process of realizing one's humanity—that is, pain that was adequate to its end, not *wasteful* pain.

*Inhuman* suffering, typically associated with barbaric behavior, was a morally insufferable condition for which someone was therefore responsible; those requiring it (themselves inhuman enough to cause it to be inflicted) must be made to desist and, if necessary, punished. That, at any rate, is the discourse of progressive reform. What individual colonial administrators actually felt, thought, or did is another (though not entirely unrelated) matter. Most experienced administrators were prepared locally to tolerate various "uncivilized" practices for reasons of expediency, but all were no doubt aware of the dominant progressivist discourse rooted in "civilized" societies.<sup>8</sup>

In a recent unpublished paper by Nicholas Dirks there is a nice example of just this discourse in late nineteenth-century British India. His account of the inquiry conducted by the colonial authorities into the ritual of hookswinging<sup>9</sup> contains this sober judgment by the presiding British official:

It is, in my opinion, unnecessary at the end of the nineteenth century and, having regard to the level to which civilisation in India has attained, to consider the motives by which the performers themselves are actuated when taking part in hook swinging, walking through fire, and other barbarities. From their own moral standpoint, their motives may be good or they may be bad; they may indulge in self-torture in satisfaction of pious vows fervently made in all sincerity and for the most

disinterested reasons; or they may indulge in it from the lowest motives of personal aggrandizement, whether for the alms they might receive or for the personal distinction and local eclat that it may bring them; but the question is whether public opinion in this country is not opposed to the *external acts* of the performers, as being in fact repugnant to the dictates of humanity and demoralizing to themselves and to all who may witness their performances. I am of the opinion that the voice of India most entitled to be listened to with respect, that is to say, not only the voice of the advanced school that has received some of the advantages of western education and has been permeated with non-Oriental ideas, but also the voice of those whose views of life and propriety of conduct have been mainly derived from Asiatic philosophy, would gladly proclaim that the time had arrived for the Government in the interests of its people to effectively put down all degrading exhibitions of self-torture (Dirks, unpublished, pp. 9-10).

The fact that the performers themselves declared that they felt no pain was irrelevant. So, too, was the plea that this was a religious rite. Such claims to difference were not acceptable. It was the offence given by the performance to a particular concept of being human that reduced qualitatively different kinds of behavior to a single standard.

Confirmation of its offensiveness was obtained by listening to *some* colonized voices only. The latter included Indians who were directly westernized. But, more significantly, confirmation was provided also by those who accepted a westernized exegesis of their Asiatic philosophy.<sup>10</sup> From the point of view of moral progress, the voices of those who took up a reactionary position could not be attended to.

Clearly, in the cause of moral progress there was suffering and suffering. What is interesting, I think, is not merely that some forms of suffering were to be taken more seriously than others, but that "inhuman" suffering as opposed to "necessary" or "inevitable" suffering was regarded as being essentially *gratuitous* and therefore legally punishable. Pain endured in the movement toward becoming "fully human," however, was necessary in the sense that there were social or moral reasons why it had to be suffered. This view is of a piece with the

post-Enlightenment concern to construct through judicial punishment the most efficient means of reforming offenders and of guarding society's interests.<sup>11</sup>

As the idea of progress became increasingly dominant in the affairs of Europe and the world, the need for measuring suffering was felt and responded to with greater sophistication.

*Representing "Torture," Acting With Deliberate Cruelty*

Pain is not always regarded as insufferable in modern Euro-American societies. In warfare, sport, and psychological experimentation—as well as in the domain of sexual pleasure—inflicting physical suffering is actively practiced and also legally condoned. This makes for contradictions which are exploited in public debate. When transitive pain is described as "cruel and inhuman," it is often referred to as *torture*. And torture itself is condemned by public opinion and prohibited by international law.

It is hardly surprising, therefore, that the many liberal-democratic governments<sup>12</sup> that have employed torture have attempted to do so in secret. And sometimes they have been concerned to redefine legally the category of pain-producing treatment in an attempt to avoid the label "torture." Thus,

Torture is forbidden by Israeli law. Israeli authorities say that torture is not authorized or condoned in the occupied territories but acknowledge that abuses occur and state that they are investigated. In 1987 the Landau Judicial Commission specifically condemned 'torture' but allowed for 'moderate physical and psychological pressure' to be used to secure confessions and to obtain information; a classified annex to the report defining permissible pressure has never been made public (U.S. Department of State, *Country Reports on Human Rights for 1993*, p. 1204).

Needless to say, other governments in the region (for example, Egypt, Turkey, and Iran) have also condoned

torture, and unlike liberal-democratic governments, they have used it freely against their own citizens. But the remarkable feature of this case is the scrupulous concern of a liberal-democratic state with calibrating the amount of pain that is legally allowable. There is evidently a concern that *too much* pain should not be applied. It is assumed that "moderate physical and psychological pressure" is at once necessary and sufficient to secure confession. Beyond that quantity, pressure is held to be excessive (gratuitous) and *therefore* presumably becomes "torture."<sup>13</sup> Other states in the Middle East are rarely so punctilious—or so modern in their reasoning.

The use of torture by liberal-democratic states relates to their attempt to control populations that are not citizens. In such cases, torture cannot be attributed to "primitive urges"—as Scott suggested; nor to governmental techniques for disciplining citizens, as Rejali has argued. It is to be understood as a practical logic integral to the maintenance of the nation state's sovereignty. Like warfare.

The category of torture is no longer limited to applications of physical pain: it now includes psychological coercion in which disorientation, isolation, and brainwashing are employed. Indeed, "torture" in our day functions not only to denote behavior actually prohibited by law, but also desired to be so prohibited in accordance with changing concepts of "inhumane" treatment (for example, the public execution or flogging of criminals, and child abuse, as well as animal experiments, factory farming, and fox hunting).

This wider category of torture "or cruel, inhuman and degrading treatment" could in theory be applied to the anguish and mental suffering experienced by people in societies obliged to give up their beliefs and "become fully human" (in the sense understood by Euro-Americans). But by a curious paradox it is a version of relativism that prevents such an application of the category. For the anguish is itself the consequence of a passionate investment in the Truth of beliefs that guide behavior. The modern *skeptical* posture, in contrast,

regards such passionate conviction to be "uncivilized" as well as a perpetual source of danger to others and of pain to oneself. Beliefs should either have no direct connection to the way one lives, or be held so lightly that they can be easily changed.

One might be inclined to think that at least in humanizing societies more sorts of inflicted pain come to be considered morally unacceptable with the passage of time. In some cases, however, pain-producing behavior that was once shocking no longer shocks. Or if it does, then not in the way it did in the past. Putting large numbers of people in prison for more and more kinds of offence is one example. Inflicting new forms of suffering in battle is another.

Some writers on pain have claimed that war is "the most obvious analogue to torture" (Scarry, 1985, p. 61). However that may be, it is significant that the general concept of "cruel, inhuman and degrading treatment or punishment" is not applied to the *normal* conduct of war—although modern, technological warfare involves forms of suffering, in numbers and in kind, that are without precedent. The Geneva Convention, it is true, seeks to regulate conduct in war.<sup>14</sup> But, paradoxically, this has the effect of legalizing most of the new kinds of suffering endured in modern war by combatants and non-combatants alike.

The military historian John Keegan wrote of the new practices of "deliberate cruelty" nearly two decades ago when he described some of the weaponry employed in twentieth-century warfare:

Weapons have never been kind to human flesh, but the directing principle behind their design has usually not been that of maximizing the pain and damage they can cause. Before the invention of explosives, the limits of muscle power in itself constrained their hurtfulness; but even for some time thereafter moral inhibitions, fuelled by a sense of the unfairness of adding mechanical and chemical increments to man's power to hurt his brother, served to restrain deliberate barbarities of design. Some of these inhibitions—against the use of poison gas and explosive bullets—were codified and given international force by the



Hague Convention of 1899;<sup>15</sup> but the rise of 'thing-killing' as opposed to man-killing weapons—heavy artillery is an example—which by their side-effects inflicted gross suffering and disfigurement, invalidated these restraints. As a result restraints were cast to the winds, and it is now a desired effect of many man-killing weapons that they inflict wounds as terrible and terrifying as possible. The claymore mine, for instance, is filled with metal cubes . . . , the cluster bomb with jagged metal fragments, in both cases because that shape of projectile tears and fractures more extensively than a smooth-bodied one. The HEAT and HESH rounds fired by anti-tank guns are designed to fill the interior of armored vehicles with showers of metal splinters or streams of molten metal, so disabling the tank by disabling its crew. And napalm, disliked for ethical reasons even by many tough minded soldiers, contains an ingredient which increases the adhesion of the burning petrol to human skin surfaces. Military surgeons, so successful over the past century in resuscitating wounded soldiers and repairing wounds of growing severity, have thus now to meet a challenge of wounding agents deliberately conceived to defeat their skills (Keegan, 1978, pp. 329–30).

One might add to this that the manufacture, possession, and deployment of weapons of mass destruction (chemical, nuclear, and biological) must be counted as instances of declared governmental readiness to engage in "cruel, inhuman and degrading treatment" against civilian populations even when they are not actually used. In brief, cruel modern technologies of destruction are integral to modern warfare, and modern warfare is an activity essential to the security and power of the modern state, on which the welfare and identity of its citizens depends. In war, the modern state demands from its citizens not only that they kill and maim others, but also that they themselves suffer cruel pain and death.<sup>16</sup>

So how can the *calculated* cruelties of modern battle be reconciled with the modern sensibility regarding pain? Precisely by treating pain as a *quantifiable essence*. As in state torture, an attempt can be made to measure the physical suffering inflicted in modern warfare in accordance with the

proportionality of means to ends. The human destruction inflicted should not outweigh the strategic advantage gained. But given the aim of ultimate victory, the notion of "military necessity" can be extended indefinitely. Any measure that is intended as a contribution to that aim, no matter how much suffering it creates, may be justified in terms of "military necessity." The standard of acceptability in such cases is set by public opinion, and that standard varies as the latter moves in response to contingent circumstances (for example, who the enemy is, how the war is going).

I want to stress that I am making no moral judgment here. My concern is to identify the paradoxes of modern thought and practice that relate to the deliberate infliction of pain between states as well as within them. If I focus on state-condoned cruelty this is not because I assume that the state is its only source today, but because our moral discourse about cruel, inhuman, and degrading treatment or punishment is closely linked to legal concepts and political interventions.

In the instances discussed so far, I have tried to suggest that the instability of the concept of physical suffering is at once the source of ideological contradictions and of strategies available for evading them. I now shift my attention to the domain of interpersonal relations that the modern state defines as "private." Here we meet with a contradiction that has deeper roots, and one which cannot be resolved simply by, say, redefining the concept of torture or by prohibiting calculated cruelty in military combat.

### *Subjecting Oneself To "Cruel and Degrading Treatment"*

While the category of "torture" has in recent times been expanded to include cases of induced suffering that are primarily or entirely psychological, it has also been narrowed to exclude some cases of the calculated infliction of physical

pain. This sometimes leads to contradictions. But there is another kind of contradiction which is characteristic of modern social life.

Moderns are aware of situations in which the sharp separation between the negative experience of pain and the positive experience of pleasure are inseparable. Sadomasochism is disturbing to many people precisely because here they are confronted with suffering that is no longer simply painful. It is at once pain and the opposite of pain. Two centuries of powerful criticism directed at the Utilitarian's calculus of pleasure versus pain has not destroyed the common sense view that these two experiences should be mutually exclusive. Yet, in the eroticization of suffering the two are intimately linked, and it is actively sought by some.

Here is an extract from a sadomasochist *Handbook* published recently:

Because I consider any attempt to define SM in a single concise phrase to be the ultimate exercise in futility—or masochism—I shall forego the temptation to add yet another version to the great discarded stack of unsuccessful, inadequate verbal garbage. Instead let me suggest a short list of characteristics I find to be present in most scenes which I would classify as SM:

- (1) A dominant-submissive relationship.
- (2) A giving and receiving of pain that is pleasurable to both parties.
- (3) Fantasy and/or role playing on the part of one or both partners.
- (4) A conscious humbling of one partner by the other (humiliation).
- (5) Some form of fetish involvement.
- (6) The acting out of one or more ritualized interactions (bondage, flagellation, etc.) (Townsend, 1989, p. 15).

Notice that this text speaks not about *expressions* of pain, still less about conventional play-acting, but about pain experienced and inflicted, in which both partners, the active and the passive, are jointly agents. So why is sadomasochism not rejected by all moderns who condemn pain as a negative experience?

One answer, according to some interpreters, is that not everyone "confuses the distinction between unbridled sadism and the social subculture of consensual fetishism. To argue that in consensual SM the 'dominant' has power, and the slave has not, is to read theater for reality" (McClintock, 1993, p. 87).

However, the point of my question is not to dismiss the distinction between "unbridled sadism" and the "subculture of consensual fetishism." It is to ask what happens when individual self-fashioning embraces every difference—including the difference between "pain" and "pleasure"—within an aesthetic whole. We are sometimes told that the hybridization of categories, including those that organize our sensual experience, is a mode by which stable authority may be subverted in the name of liberty. But it is possible also that the eroticization of pain is merely one of the ways in which the modern self attempts to secure its elusive foundation.

Recently, an article in a London newspaper gave the following account of a local performance by an American artist at the Institute of Contemporary Arts:

With his face set in a mask of concentration, Ron Athey allows his head to be pierced with a six-inch needle just above the eyebrow. You watch, transfixed, as the needle snakes along beneath the skin like water pulsing through an empty hosepipe. A droplet of blood wells up at the point where steel meets scalp. This is the first spike of Athey's crown of thorns—a body piercer's tribute to the power of Christian iconography, an ex-junkie's flirtation with the needle, and a gay man's defiance of infection with HIV.

By the time the macabre 'sketch' is finished, Athey is encrusted with needles, garlanded with wire and oozing blood, in what appears to be a parody of the crucifixion. Ah, but is it a parody, defined in the dictionary as 'an imitation so poor as to seem a deliberate mockery of the original?' Or is it—as Athey's supporters would claim—an exploration of the nature of martyrdom, as manifest to a worldwide gay community in the era of Aids? (Armistead, 1994, p. 26).

What is remarkable about these opening paragraphs is that

the writer of this account finds herself having to put the familiar theatrical word "sketch" in quotation marks—but not so the equally familiar theological expression *martyrdom*. The reader is given to understand that this is a *real* tribute to the power of Christian iconography, a *real* exploration of the nature of (Christian) martyrdom, but that it only "appears" to be a form of theater, an "imitation."<sup>17</sup>

I stress that I am not here challenging this claim, but underlining the writer's recognition that in the discourse of modern self-fashioning, the tension holding "real" and "theatrical" apart can collapse. It is especially in a modern culture, where the split between the real and its mere representation has become institutionalized, that it becomes necessary to assert from time to time that a given performance is *merely* theatrical, or that another performance is *not really* theater. My point here, however, is that it is the *difference* between "the real" and "the mimetic"—like the difference between "pain" and "pleasure"—that is available to modern self-fashioning. And that, consequently, the tension between "real" and "pretend" bondage is itself aestheticized, and the clear distinction between consent and coercion problematized.

Of course, SM as defined in the text I quoted earlier is different from this performance at the I.C.A. For one thing, in the latter there is a separation between performers and observers. No experience of giving and receiving pain binds the two together in mutual pleasure. We find only a one-sided representation (presentation?) of an evocative image of suffering, which is preceded by a painful construction of that image on the stage. Furthermore, its intention is not the production of private pleasure. We cannot know whether the various members of Athey's audience respond primarily to the icon of Christ's last passion or to the painful construction of that icon on the stage—or to both. Nor can we tell what difference it would make to those who would like to ban this performance if they were to be told that Athey suffers from a malfunctioning of the nervous system so that he actually feels

no pain. Or—more tellingly—that like a religious virtuoso he has learnt to experience it *positively*.

Think of the Shi'a Muslim flagellants mourning the martyrdom of the Prophet's grandson Hussain annually every Muharram. That instance of self-inflicted pain is at once real *and* dramatic (not "theatrical"). It has even less to do with "pleasure" than does Athey's performance. It differs from the latter in being a collective rite of religious suffering and redemption. It is not a secular act that borrows a religious metaphor to make a political statement about prejudice. Nor is it premised on the right to self-fashioning and the autonomy of individual choice. Yet both strike against the modern sensibility that recoils from a willing, positive engagement with suffering. Because for ascetics, as for sadomasochists, pain is not merely a means which can be measured and pronounced excessive or gratuitous in relation to an end. Pain is not action, but passion.

These brief references to pain willingly endured in modern society help us to raise some questions at the trans-cultural level.

The interesting thing about the criteria enumerated in the SM text I quoted above is that they come up against Article 5 of the *Universal Declaration of Human Rights*: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This rule is not qualified by the phrase "unless the parties concerned are consenting adults." In the same way and for the same reason that one may not consent to sell oneself into slavery, even for a limited period. Not even if the parties concerned find the relationship of bondage erotic.

So, too, the liberalized Church strongly disapproves of monks being whipped at the command of their abbot for penalizable faults—even when the penance has a ritual closure and a dramatic character, and even if the monks have taken monastic vows of obedience voluntarily. This follows from the modern rejection of physical pain in general and of

“gratuitous” suffering in particular. But it is more precise to put it this way: the modern hostility is not simply to pain, it is to pain that does not accord with a particular conception of being human—and *that is therefore in excess*. “Excess” is a concept of measure. An essential aspect of the modern attitude to pain rests on a calculus that defines appropriate actions.

Needless to say, nothing I have said so far is an argument against SM. I am not denouncing a “dangerous” sexual practice.<sup>18</sup> Nor am I concerned to celebrate its “emancipatory” social potential.<sup>19</sup> These antagonistic positions seem to me to assume that “sadomasochism” has an essence. They are mirror images of each other. But the *essence* of what legal and moral discourse constructs, polices, and contests as “SM” is not the object of my analysis. As in the field of “abnormal and unnatural” sexual practices generally, state power is, of course, directly and vitally involved—helping to define and regulate normality. My concern here, however, is with the structure of public debate over the valorization of painful experience in a culture that regards it negatively. In that debate, argument is sharpened because, on the one hand, moderns disapprove of physical pain as “degrading.” On the other hand, they are committed to every individual’s right to pursue unlimited physical pleasure “in private”—so long as that conforms to the legal principle of consenting adults and does not lead to death or serious injury. Thus, one way that moderns attempt to resolve this contradiction is by defining cruelty in relation to the principle of individual autonomy which is the necessary basis of free choice. However, if the concept of “cruel, inhuman and degrading treatment” cannot be consistently deployed without reference to the principle of individual freedom, it becomes relativized.

This becomes clearer in the trans-cultural domain. For here it is not simply a matter of eliminating particular cruelties, but of imposing an entire modern discourse of “being human,” central to which are its ideas about individualism and detachment from passionate belief. Thus, while at home the

principle of consenting adults within the bounds of the law works by invoking the idea of free choice based on individual autonomy, the presence of consenting adults abroad may often be taken to indicate mere "false consciousness"—a fanatical commitment to outmoded beliefs—which invites forcible correction.

Yet, only the suspicious individual—suspicious of others and of herself—can be truly autonomous, truly free of fanatical convictions. But continuous suspicion introduces instability at another level: that of the subject.

### *Concluding Comment*

I have tried to problematize the basic idea underlying the United Nations declaration that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." I have suggested that the idea is unstable, mainly because the aspirations and practices to which it is attached are themselves contradictory, ambiguous, or changing. Of course, the fact that an idea is unstable may not be, in itself, reason enough for abandoning it. But neither the attempt by Euro-Americans to impose their standards by force on others nor the willing invocation of these standards by weaker peoples in the third world makes them stable or universal. It merely globalizes them.

We need ethnographies of pain and cruelty which can provide us with a better understanding of how relevant practices are actually conducted in different traditions. Such ethnographies will certainly show us that cruelty can be experienced and addressed in ways other than as a violation of rights—for example, as a failure of specific virtues or as an expression of particular vices. They will also show us that if cruelty is increasingly represented in the language of rights (and especially of human rights), then this is because *perpetual legal struggle* has now become the dominant mode of moral



engagement in an interconnected, uncertain, and rapidly changing world.

### Notes

<sup>1</sup> So, too, Page DuBois (1991, pp. 153–57).

<sup>2</sup> Z. Bauman (1989) has explored the structures and processes of the modern state that made possible the distinctive modes of cruelty under Nazism.

<sup>3</sup> Incidentally, there is a curious paradox in invoking a metaphor of military violence (“to affront and conquer”) to describe the compassionate work of healing. But such paradoxes abound in Christian history, of course.

<sup>4</sup> Thus, Beccaria denounces “the barbarous and useless tortures multiplied with prodigal and useless severity for crimes that are either unproven or chimerical” (1986, p. 4). And Voltaire, with characteristic sarcasm, remarks that, “*On a dit souvent que la question [that is, torture] était un moyen de sauver un coupable robuste, et de perdre un innocent trop faible*” (1818, Vol. 26, p. 314).

<sup>5</sup> See the two fragments first published as “Bentham on Torture” in Bentham, 1973, p. 45.

<sup>6</sup> In her important work, *Classical Probability in the Enlightenment* (1988), Lorraine Daston has described how, over two centuries, Enlightenment mathematicians struggled to produce a model that would provide a moral calculus for “the reasonable man” in conditions of uncertainty. Although modern probability theory has become entirely divorced from this moral project since about 1840, the idea of a calculus continues to be powerful in liberal welfare discourse.

<sup>7</sup> Lord Milner, Under-Secretary for Finance during the British Occupation of Egypt which began in 1882, described Britain’s imperial task in that country as follows:

This then, and no less than this, was meant by ‘restoring order.’ It meant reforming the Egyptian administration root and branch. Nay, it meant more. For what was the good of recasting the system, if it were left to be worked by officials of the old type, animated by the old spirit? ‘Men, not measures,’ is a good watch-word anywhere, but to no country is it more profoundly applicable than to Egypt. Our task, therefore, included

something more than new principles and new methods. *It ultimately involved new men.* It involved 'the education of the people to know, and therefore to expect, orderly and honest government—the education of a body of rulers capable of supplying it' (1899, p. 23).

Here Milner enunciates the government's need to create subjects (in both senses) as well as rulers informed by new standards of human behavior and political justice. That this would involve the application of some force and suffering was a secondary consideration. I stress that my point is not that colonial administrators like Milner lacked "humanitarian" motives, but that they were guided by a particular concept of "humanness."

<sup>8</sup> I am grateful to Jon Wilson for informing me that, "The word *expediency* is one that we find again and again in Imperial India's official documents, from the 1820's to the *Royal Commission on Agriculture of 1928*." Resort to expediency, as to "interest," indicated a distrust of passionate belief. See Hirschman, 1977.

<sup>9</sup> Hookswinging involves a ceremony in which the celebrant swings from a cross-beam built for the purpose on a cart, suspended by two steel hooks thrust into the small of his back. See Kosambe, 1967.

<sup>10</sup> In relation to the more celebrated British prohibition of *sati* (the self-immolation of Hindu widows on the funeral pyre of their husband) in 1829, Lata Mani notes that,

Rather than arguing for the outlawing of *sati* as a cruel and barbarous act, as one might expect of a true 'moderniser,' officials in favour of abolition were at pains to illustrate that such a move was entirely consonant with the principle of upgrading indigenous tradition. Their strategy was to point to the questionable scriptural sanction for *sati* and to the fact that, for one reason or another, they believed its contemporary practice transgressed its original and therefore 'true' scriptural meaning (Mani, 1985, Vol. 1, p. 107).

Thus, it was a modernized "Hinduism" that was made to yield the judgment that *sati* was a cruel and barbarous act.

<sup>11</sup> Reformatory theory presented punishment to offenders as being 'in their best interests' while utilitarian theory cast it as an impartial act of social necessity. In rejecting retributive theory, the reformers sought, in effect, to take the anger out of punishment. As it was legitimized to the prisoner, punishment was no longer to

be, in Bentham's words, 'an act of wrath or vengeance', but an act of calculation, disciplined by considerations of the social good and the offenders' needs (Ignatieff, 1989, p. 75).

<sup>12</sup> For example, France in Algeria, the United States in Vietnam, Israel in Gaza and the West Bank, Britain in Aden, Cyprus, and Northern Ireland.

<sup>13</sup> This is precisely Bentham's argument about the rationality of torture in comparison with punishment:

The purpose to which Torture is applied is such that whenever that purpose is actually attained it may plainly be seen to be attained; and as soon as ever it is seen to be attained it may immediately be made to cease. With punishment it is necessarily otherwise. Of punishment, in order to make sure of applying as much as is necessary you must commonly run a risque of applying considerably more: of Torture there need never be a grain more applied than what is necessary (Bentham, 1973, p. 45).

<sup>14</sup> It should not be forgotten that medieval warfare also had its rules (see, for example, Contamine, 1984). In one sense, the moral regulation of conduct in warfare was even stricter in the early middle ages: killing and maiming, even in battle, was regarded as a sin for which the church demanded penance (see Russell, 1975).

<sup>15</sup> Of the mushrooming or "dum-dum" bullet, invented in British India in 1897, Daniel Headrick observes: "This particular invention was so vicious, for it tore great holes in the flesh, that Europeans thought it too cruel to inflict upon one another, and used it only against Asians and Africans" (Headrick, 1979, p. 256).

<sup>16</sup> The paradox here is that the modern citizen is a free individual and yet he is obliged to forego the most important choice a free human being can make—that affecting his life or death. The modern state can send its citizens to their unwilling deaths in war and forbid them from willing to end their own lives in peace.

<sup>17</sup> Cf. McClintock (1993, p. 106): "SM is the most liturgical of forms, sharing with Christianity a theatrical iconography of punishment and expiation: washing rituals, bondage, flagellation, body-piercing, and symbolic torture." But why only *symbolic*?

<sup>18</sup> See, for example, Linden et al., 1982. See also the legal judgments in the Spanner case in England, now being appealed against in the European Court.

<sup>19</sup> The radical social criticism allegedly expressed by SM is eloquently argued for in McClintock's article, but the liberatory

implications of SM are explicitly retracted at the end. (See also the clever book by Angela Carter [1979].) While such writings typically provide radical political decodings of SM narratives, they also seem to be saying that as a mode of obtaining orgasm, SM is the product of socially distorted and sexually repressive relations.

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